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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-72

UNITED STATES OF AMERICA,
*Petitioner,*

*v.*

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY, AND BRISTOL-MYERS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT AMERICAN CYANAMID COMPANY

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December 15, 1971

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## BRIEF FOR RESPONDENT AMERICAN CYANAMID COMPANY

## PRELIMINARY STATEMENT

The defendants-respondents here have been under attack in judicial, administrative, legislative, and media contexts for nearly a score of years.* Surely, if there were issues now deserving this Court's attention, the contending parties should be able to agree on the questions presented for review. This minimal plateau has not been achieved.

* Basic dates are in the record (463a-562a).

## QUESTION PRESENTED FOR REVIEW

Respondent American Cyanamid Company ("Cyanamid") respectfully submits that the only question presented for review is:

> Did the court of appeals for the Second Circuit err in its factual conclusion, based upon an intensive study of a record of 12,583 printed pages, that the trial errors which it found, ". . . when taken as a whole, were sufficient to deprive the defendants of a fair trial." (Joint Appendix at 12618a, 437 F.2d at 958).*

The petitioner seeks to avoid meeting this basic question posed by the court of appeals' opinion. It advances narrowly circumscribed issues predicated upon the assumption that the court of appeals reversed for particularized errors in the trial court's charge to the jury considered in isolation. Put bluntly, the petitioner asks this Court either to disregard or to disbelieve the explicit statements of the court of appeals that its decision rested upon a consideration of the whole of the charge and the entire record (12598a, 12611a, 426 F.2d at 41, 48).

Cyanamid's brief will deal with the various points urged by the petitioner, but it will do so on the level of what the court of appeals actually did and decided, rather than within an artificial framework devised from an unjustifiably fragmented analysis.

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* The Second Circuit's initial opinion is reported at 426 F.2d 32; its opinion denying the government's petition for rehearing is reported at 437 F.2d 957. Both opinions appear in the Joint Appendix, the first at 12585a, the second at 12617a. Citation to the Joint Appendix hereinafter will be by page reference only.

## COUNTER STATEMENT

**The court of appeals' factual summary is thorough and is not attacked by petitioner.**

The opinion of the court of appeals sets forth in approximately ten pages what that court describes as a "highly selective" condensation of the voluminous record, "concentrating on the determinative facts" (12586a-94a, 426 F.2d at 33-38). The petitioner's 25-page "statement of the case" in its brief (herein cited as "Br.") nowhere challenges the accuracy of the court's synopsis.

Cyanamid concurs in the view of the court of appeals that its summary outlines the determinative facts, which were essentially undisputed (12587a, 426 F.2d at 34). To avoid burdening the Court with repetition, therefore, Cyanamid will rely primarily on the opinion of the court of appeals for the factual background.

By way of added counter statement, Cyanamid refers only to facts supporting two important conclusions of the court of appeals: (1) the "closeness" of the case; and (2) the particularly inflammatory nature of the issue of "unreasonably high" prices and profits, as aggravated by the aura of prejudicial publicity before and during the trial.

**The court of appeals' appraisal of the case as a "close" one.**

In the conclusion to its brief, the petitioner protests categorically that the "case against respondents was a strong one" (Br. at 89). The court of appeals, however, concluded that "... it would indeed be difficult for an appellate court to say that these items [the cumulative errors] may not have affected the jurors' votes in a criminal case so close as this" (12618a, 437 F.2d at 959); and further

expressed its inclination to the view that ". . . there was insufficient evidence to warrant submission to the jury of the issue whether [Bristol] had conspired with Pfizer and Cyanamid to exclude others from the tetracycline market" (12619a, 437 F.2d at 959). Affirmation of the strength of the prosecution's case cannot draw support even from the dissent, which dignified its evidence with no higher accolade than that it "is not overwhelming" (12611a, 426 F.2d at 48).

Guilt in this case is argued as an inference sought to be drawn from circumstantial evidence, resting "almost entirely upon oral and written statements from defendants themselves. Because of this circumstance, the facts may be said to be virtually undisputed" (12587a, 426 F.2d at 34). No contract was claimed to be unlawful without reference to other facts (280a, 4865a, 4966a, 12590a, 426 F.2d at 36); no patent was asserted to be invalid (274a, 293a);* no witness gave testimony inconsistent with unilateral action in pursuance of the legitimate commercial interests of his company (12587a, 12590a, 426 F.2d at 34, 36). As the court of appeals said, the entire trial revealed a case ". . . wholly dependent for conviction upon the jury's drawing of inferences in direct contrast to the statements of the witnesses present and the documents evidencing their agreement[s]" (12610a, 426 F.2d at 47). This statement related specifically to Bristol and Pfizer, but is applicable equally to the whole record. The court of appeals correctly evaluated this as a "close" case.

Charges substantially similar to those made here were presented by the complaint in the Federal Trade Commission case, *Matter of American Cyanamid et al.*, FTC Docket 7211 ("the FTC case"), filed in 1958. The eventual result of the FTC case confirms the court of appeals' evaluation of this case.

* The cited reference is to the bill of particulars and relates to the Pfizer tetracycline patent. While other patent files were in evidence, the petitioner did not question the validity of any of the patents.

Shortly after the indictment in this case in August 1961, the FTC Hearing Examiner who had conducted an extensive trial issued a 195-page Initial Decision dealing with the evidence in great detail and absolving the defendants of all charges. 1961-63 Transfer Binder Trade Reg. Rep. ¶ 15,537 (FTC 1961). These included charges of conspiracy to exclude others and to fix prices, which are essentially the charges of the indictment.

The Initial Decision, as to the part of the result dismissing the charges of conspiracy to exclude others, was affirmed by the Commission in 1963. 63 FTC 1747, 1862-64 (1963). The Commission at this point reversed the Hearing Examiner's conclusion that a price conspiracy had not been established, but this decision was vacated by the Sixth Circuit on the ground that the Commission's Chairman was disqualified. 363 F.2d 757 (6th Cir. 1966). After remand, the Commission dismissed the charges of a price fixing conspiracy by a 2-2 vote. 1967-70 Transfer Binder Trade Reg. Rep., ¶ 18,077 (1967).*

The nature of the jury's deliberations at the trial of this case indicates that it found the issues difficult and probably puzzling. The deliberations extended over a period of two days, including part of the night of each. The jury asked that parts of the evidence be given to it (5071a). As shown hereafter in the argument (pp. 37-38, *infra*), the last request was for some items of evidence relating to Parke, Davis which were favorable to the defense but with which, as the court of appeals held, the trial judge's instructions had dealt in a manner calculated to mislead the jury into disregarding the evidence.

The court of appeals did not impulsively reach the conclusion that the errors in the record compelled reversal. After the argument it considered the case for an overall period

* The Commission found that certain separate actions of Pfizer and Cyanamid amounted to unfair competition violating § 5 of the FTC Act, and this was affirmed on a second review by the Sixth Circuit (401 F.2d 594 (6th Cir. 1968)).

of some 18 months. The initial opinions of the panel which heard the argument were not handed down for more than 11 months. The court of appeals pinpointed the strategy followed by the prosecution:

> "Probably, of necessity, the government virtually had to ignore or at least play down the business reasons asserted by the defendants' executives as motivating their agreements and the actions taken by them and to concentrate on the possibly more jury appealing aspects such as abnormally high prices and profits and patent fraud.
>
> . . . But as the case was submitted to the jury, [the 'primary issue' of conspiracy] was subordinated in government summation and the charge to the more inflammatory issues of illegally exorbitant prices charged a victimized public and patent fraud." (12611a, 426 F.2d at 48. *See also* 12602a, 426 F.2d at 43).

The court concluded:

> "A review of the entire record leads to the conclusion that the judgments of conviction . . . must be reversed . . ." (12611a, 426 F.2d at 48).

A further indication that the case is at least a "close" one appears in an opinion of Judge Inzer B. Wyatt of the Southern District of New York, approving a settlement of certain damage cases brought against the respondents in which the complaints made allegations similar to those made in the FTC case and the indictment. He evaluated the probabilities of the plaintiffs' success, and stated that he had examined the record on appeal of the FTC case in the Sixth Circuit and the record of this case in the Second Circuit. His conclusion, based on "careful study of those records" was that "the chances of recovery in any of these cases are no better than 50-50 and probably should more realistically be called slight." *State of West Virginia* v. *Chas. Pfizer & Co., Inc. et al.*, 314 F.Supp. 710, 741 (SDNY 1970), *aff'd* 440 F.2d 1079 (2d Cir. 1971), *cert. den.* U.S. (1971).

**Prejudicial publicity before and during the trial which enhanced the inflammatory nature of the issue of "unreasonably high" prices and profits.**

In testing the court of appeals' appraisal of the record as a whole, the trial court's actions and omissions must be considered in the setting in which they occurred. A material aspect of that setting was the publicity against the background of which the trial was held.* The context is amply documented in the record (309a-17a, 5502a-29a, 5609a-29a, 5635a-6330a), which shows that the court of appeals was fully justified in referring to the matter of alleged "unreasonably high" prices and profits as "inflammatory" (12602a, 12611a; 426 F.2d at 43, 48). The trial court repeatedly was advised of this publicity and was urged to exercise appropriate care to avoid its improperly influencing the jury (308a-13a, 852a-53a, 997a-1005a, 1265a-68a, 6648a).

During 1959 and 1960 the Subcommittee on Antitrust and Monopoly of the United States Senate conducted a widely publicized series of hearings concerning the prescription drug industry. From the transcript of these hearings and the report of the Subcommittee issued after the hearings, it appears that a major effort was made to show that the prices of prescription drugs were unreasonably high and that their manufacturers were profiteers (309a, and citations there stated). In the ensuing years, the communications media channeled to the public in New York and elsewhere a barrage of publicity critical of, and tending to excite prejudice against, the pharmaceutical industry. While

* With the exception of the slant given to a press release at the time of indictment, mentioned hereafter, the defendants have not taken the position that the publicity was stimulated by counsel responsible for the prosecution. Government counsel so represented to the trial court and defense counsel so assumed (4935a).

the grand jury was in session in 1960, these specific defendants were under attack with respect to their antibiotic products (310a). Facsimile samples of such attacks are in the record (5657a-6137a).

Throughout the period, the technique was employed (as by the petitioner in the trial below) of comparing bare factory production cost of a drug with its ultimate selling price, and ignoring all administration, sales, research and other costs incident to the operation of the business. The thrust of the news approach may be illustrated by typical headlines:

> "Reveal 1,118% Drug Markup" (5662a). "Senate Prober Reveals 1,000% Drug Markup" (5657a). "10,000 Pct. Drug Markup Charged" (5685a). "Drug Gouge Put at $750 Million" (5679a). "Estes Reports on Drug Probe's 1st Round:
> Prices Too, Too High" (5683a).

Not surprisingly, the infection appears to have reached the author of the Department of Justice press release on August 17, 1961, which stated that Cyanamid and the other defendants had been indicted "on charges of maintaining unreasonably high and non-competitive prices and monopolizing the production and distribution of the drugs since November, 1953" (314a). Not until the ninth paragraph did the Department of Justice release even mention the accusation of "conspiracy." A press release from Senator Kefauver on the same date referred only to "the exorbitant price" of pharmaceuticals, and did not employ the word "conspiracy" (317a). The press releases bore foreseeable fruit. In stories appearing in each of eight New York City newspapers on August 18, 1971, references were made to allegations of "unreasonably high" prices or profits or both (311a).

Adverse criticism of the drug industry again received special stimulus just before and during the trial. The

Monopoly Subcommittee of the Senate Select Committee on Small Business initiated in 1967 a series of widely publicized hearings on drug pricing. The Committee rejected the communicated concern of defense counsel that such hearings would make a fair trial difficult, and spurned the suggestion that the hearings be deferred to avoid prejudice (5643a-45a, 5650a-55a).

Much publicity was given to charges made at these 1967 hearings that drug prices were excessive and pricing practices improper. Stories appeared in newspapers and magazines (*e.g.*, 5516a-21a, 5609a-27a, 5629a, 6088a, 6096a, 6114a). Radio and television contributed their facilities (*e.g.*, WNBC, April 19, 1967, 8:05 p.m., 6142a; WPAT, May 15, 1967, 4:30 p.m., 6086a, witness "accused the industry of conspiring to keep prices high . . ."; WNBC/TV, May 15, 1967, 6:00 p.m., 6106a).

On October 9, 1967, two weeks before the trial began, the head of the Food and Drug Administration and the chairman of the Federal Trade Commission, appearing on the NBC Today Show, expressed views indicating belief that drug prices and profits were too high, and that there was an alleged absence of competition (5504a, transcript at 5510a). On November 18, 1967 the "pharmaceutical houses" were cartooned as injecting high price drugs through promotion and propaganda into the arms of doctors and patients, under a pun caption, "The Drugging Industry" (5280a).

On December 14, 1967, on the eve of the day that the jury was to return after a seven-day recess following the completion of the petitioner's case, the Subcommittee called George R. Squibb, a former executive of the alleged co-conspirator, E. R. Squibb & Sons, and promptly issued a press release on Squibb's testimony which release constituted an all-out, inflammatory attack on the pricing policies of the drug industry (5505a, transcript at 5516a-17a). Reports of this testimony were broadcast on the various

New York radio and television stations on December 14, 1967. Transcripts of some of these broadcasts are in the record (NBC, 5621a; CBS, 5518a, 5617a, 5618a, 5622a; WNEW, 5519a; WQXR, 5620a; WABC, 5623a, 5624a).

Newspaper publicity included a story in the New York Times of December 15, 1967 referring to George Squibb as having urged reductions in drug prices and having spoken of "exploitation of medicines" and "wasteful" research (5520a). On the same day the New York Daily News stated that Mr. Squibb had testified that the public would be paying less for drugs if pharmaceutical manufacturers were less "greedy," and referred to markups of "nine or 12 or 20 times factory cost" (5521a).

In the following eleven days, while the jurors were at liberty as the court worked on its charge, the attacks continued. On December 19, 1967 the New York Post headline was "Senators Told Drug Biz Juggles Prices" (copy, 5611a). On December 20, the Daily News headline was "Second Study Confirms Overcharging on Drugs" (5612a). On December 21, a headline "The Drug Profiteers (Contd.)" appeared (5626a). Christmas day was marked by the report of a Christmas eve attack by Senator Nelson on drug prices for cities (New York Times, 5627a).

The jury returned to court on December 26, 1967 to hear the final arguments. While they were in progress the New York Post on December 27th published a Herblock cartoon depicting the pharmaceutical houses as obese profiteers shaking excessive prices from the public (5629a).

On the date of its publication, which was the day of the government's closing argument, the cartoon was brought to the trial court's attention. At that time reconsideration of a motion to dismiss the indictment previously made was asked, and alternatively the court was asked to reconsider and grant a motion to strike the evidence as to costs and profits and instruct the jury to disregard that subject

(4924a). The motions were not granted. The next day (December 28, 1967) the trial judge devoted a great deal of attention to prices and profits in his instructions, and specifically told the jury that the reasonableness of prices was in issue, and that if the jury found prices were unreasonable it might consider this as evidence of conspiracy.

## SUMMARY OF ARGUMENT

This is an antitrust case, but it is also a criminal case. It does not "impede" the proper and effective enforcement of the antitrust laws to insist that prosecutors and trial courts be required, under peril of reversal, to accord to defendants a fair trial: the minimum right of any indicted defendant under our system of laws. It does not impose any inappropriate burden on the prosecutor or the court to require that the charge to the jury in a complex case shall be fair and balanced, and shall not be such, on the record as a whole, as to tend to mislead the jury or divert it from the true issues. The government concedes that in this trial there occurred what it calls "genuine errors" (Br. p. 89). No verdict resulting from a court room encounter in which the cumulative effect of genuine errors is to deprive the defendant of a fair trial can be allowed to stand. The court of appeals' decision accords with these precepts. This Court should leave no doubt that they apply to over-zealous prosecution in antitrust cases as they do in any other criminal case.

I. The court of appeals concluded that the errors occurring during the trial of this case, considered separately and cumulatively, were of such a prejudicial nature as to deprive the defendants of their right to a fair trial. While the petitioner recognizes that "genuine errors" occurred, it asserts that they were "harmless."

The settled test for determining whether an admitted error in a criminal case should be deemed to require reversal or should be disregarded as "harmless" calls for the appellate court to determine whether there is a reasonable possibility that it may have contributed to the conviction. Applying this test here, the court of appeals rejected the petitioner's contention. It performed ably, fully, conscientiously and exhaustively the role which is assigned to it in our judicial system. No issue presented justifies the Supreme Court's now retracing this meticulous factual evaluation. The Court accordingly should dismiss the writ of certiorari as improvidently granted.

II. This case was tried against a background of years of emotional accusations that the defendants' prices and profits were "unreasonably high." There was no direct evidence of conspiracy and the only direct evidence was that there was no conspiracy. The prosecution's reliance was on circumstantial evidence, the most prejudicial of which related to the claim that prices were "unreasonably high." The trial court instructed the jury that a finding of unreasonable prices would constitute evidence of conspiracy. Under the facts of this case, a finding that prices were unreasonable might and probably would be the determining factor in the jury's decision on the basic question of conspiracy. This Court has rejected a construction of the Sherman Act "making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable * * *" 273 U. S. 397, 398.

III. The petitioner's brief argues the identity of published prices to certain classes of customers—primarily wholesalers and retailers—as a basis for an inference of conspiracy. The trial court's charge devoted substantial space to these charges of price stability.

Under accepted economic principles, in an oligopoly situation such as existed here, price uniformity and stability are normal rather than abnormal. The applicability of this principle is to be seen in the evidence regarding prices under admittedly non-conspiratorial conditions. The same pricing policies as those prevailing during the period of the claimed conspiracy were followed, (i) at all times by Parke, Davis, an admitted non-conspirator, (ii) by Pfizer and Cyanamid during a period of years before the claimed formation of the alleged conspiracy, and (iii) by Bristol, Squibb and Upjohn during a period of nearly two years before they were claimed to have joined the alleged conspiracy. These facts, indicating that the price behavior was consistent with unilateral action, reinforced extensive testimony of defendants' officials that their decisions had been independent. The trial judge erred in not pointing out such facts, while stressing price stability as circumstantial evidence of conspiracy.

IV. The trial judge's treatment of the evidence relating to the conduct of a non-defendant and conceded non-conspirator, Parke, Davis, which paralleled that of the defendants, as the court of appeals said, "alone might have prejudiced the jury's judgment." The trial court erroneously limited the arguments of defense counsel relating to Parke, Davis; refused to give requested instructions which would have pointed out the probative weight of the evidence of Parke, Davis' conduct on the issue of the innocence of the defendants; and gave instructions which destroyed the value of the evidence to the defense.

V. In view of the theory of the prosecution that the alleged conspiracy was initiated and subsequently expanded by the principal officers of defendants at identified and specified meetings, and that inferences of what happened at these meetings might be drawn from the subse-

quent market behavior of the drug tetracycline, the testimony of the officers was of vital importance to the defense. The court of appeals correctly held that the charge to the jury "slighted and rather deprecated the testimony." The instructions described the witnesses as having denied guilt "in broad terms" when their testimony in fact was detailed and specific; incorrectly suggested that there was inconsistency between the testimony and the earlier conduct of the defendants and officials; erroneously implied that the witnesses had said merely that they had not "believed" they had violated the law; and confusingly referred to "assertions of innocence" as involving legal as well as factual contentions.

VI. The court of appeals correctly held that the court's charge to the jury overemphasized the claims and evidence relating to alleged fraud on the Patent Office, diverting the jury from the real issue of conspiracy. As in the case of the overemphasis on the accusation that prices and profits were "unreasonably high," the effect of the treatment of the evidence relating to the patent applications was to represent the defendants as evil, and to deflect the jurors from the true issue of conspiracy.

VII. The cumulative effect of the various errors materially enhanced their prejudicial effect on the defendants. The court of appeals correctly concluded that the errors had such an interrelation that their effect was to deprive the defendants of a fair trial.

VIII. The sufficiency of the evidence to support the verdict is not the issue here, but the closeness of the case is a factor to be considered in determining whether the errors denied the defendants a fair trial. In a case where the scales are closely balanced, it is especially important that the trial be conducted with scrupulous care. The possibility

that an error will affect the verdict is increased in such a case, and correspondingly the range of "genuine error" which properly may be disregarded as "harmless" is narrow. From the prosecution's standpoint, the present case was at most a close one, and the effect of the errors was to deny the defendants a fair trial.

IX. The court of appeals stated that it had not passed upon a number of defense contentions. It made clear that it had not rejected those contentions. An important example was its statement that upon considering the petition for rehearing it was inclined to the view that there had been insufficient evidence to warrant submission to the jury of the issue whether Bristol conspired with Pfizer and Cyanamid to exclude others from the tetracycline market. A charge to the jury corrected in this vital respect would alter materially the thrust of the accusations against Cyanamid and would affect significantly both summations and jury deliberations. If all else were ignored, this alone would compel the reversal which the court of appeals ordered.

## ARGUMENT

### I.

**The case appropriately may be disposed of by dismissal of the writ of certiorari as improvidently granted.**

The substance of the petitioner's position (Br. at 36-38, 88-93) is that the conceded "genuine errors" of the trial should be classified as "harmless." In support of this argument, petitioner quotes (Br. at 91) a sentence from *Lutwak v. United States*, 344 U. S. 604, 619, for the thesis that a defendant is not entitled to a "perfect" trial. The first part of this sentence, however, states that a defendant is entitled to a "fair trial."

The court of appeals devoted months of labor to its decision in a case in which its opinions present no questions of precedential importance (12619a, 437 F.2d at 959).* The two opinions make clear that the reversal stemmed from the court's thoroughly considered judgment, on the entire record, that the errors were of such a prejudicial nature as to deny to the defendants a fair trial. A court of review has the duty first to identify errors and then to determine whether they can be disregarded as harmless. In the present case the dissenting judge did not exclude errors; he thought them harmless, but the majority found errors so fraught with prejudicial tendency as to demand reversal. Where a court of appeals thus has conscientiously performed its assigned role, this Court normally should not expend its time in duplicative review.**

The petitioner urges that in criminal antitrust cases, appellate courts should not "comb" the record for errors (Br. at 32, 89). The "combing" here consisted of the court's considering the defendants' complaints of matters which first and fruitlessly were called to the attention of the trial court. When the petitioner's "combing" assertions are linked with its further statements to the effect that if the reversal by the court of appeals be allowed to stand the prosecution of major Sherman Act violations will be seriously impaired (Br. at 90), and that basic constitutional rights or life are not at stake (Br. at 91), the argument comes alarmingly close to an assertion that defendants in criminal antitrust trials, at least where only corporations are charged, are not entitled to a fair trial and that errors seldom, if ever,

* The petitioner virtually admitted this in the petition for certiorari (Pet. Cert. at 13).

** The Court has criticized the provision of the Expediting Act of 1903 for committing to it the direct review of district court decisions in civil government antitrust cases, on the ground that it requires the Supreme Court to perform the functions of a court of appeals. *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 355 (1962); *United States* v. *Singer Mfg. Co.*, 374 U. S. 174, 175n. 1 (1963).

can be harmful. This Court has never taken the view, however, that the rights of defendants are less in criminal antitrust cases than in other criminal cases. *Cf. National Dairy Products Corp.* v. *United States,* 384 U. S. 883 (1966) and *Dennis* v. *United States,* 384 U. S. 855 (1966).

In any criminal case the test of whether errors are harmless must be whether there is a reasonable possibility that they may have contributed to the conviction. Applying this test, the court of appeals rejected the petitioner's contention that the errors were harmless. In the light of the careful review which preceded and led to this conclusion, and since no questions of substance which could affect other cases are involved, the Court should dismiss the writ of certiorari as improvidently granted.*

This suggestion is wholly appropriate in view of the narrow approach to the record which characterized the petition for certiorari and which gave this Court an opportunity for only a limited appreciation of the history of the case; and of the Court's present access to the full record, permitting it to appraise the "totality of circumstances as the record makes them manifest." *Bullock* v. *South Carolina,* 365 U. S. 292 (1961). There is nothing extraordinary in concluding in such a situation that a case does not merit the plenary review which the Court, on the basis of the petition, initially through might be indicated. *Baldonado* v. *California,* 366 U. S. 417 (1961).

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* Alternatively, the Court should summarily affirm the judgment of the court of appeals without reviewing the entire record. District court decisions have been summarily affirmed even in civil antitrust cases where by reason of the Expediting Act there is no intermediate appellate review. *Kennecott Copper Corp.* v. *United States,* 381 U. S. 414 (1965); *Columbia Artists Management, Inc.* v. *United States,* 381 U. S. 348 (1965).

## II.

**The excessive emphasis in the trial on the charge that prices and profits were "unreasonably high," and the trial court's treatment of the evidence relating to this charge, denied the defendants a fair trial.**

### A. Structure of the accusation.

The indictment (24a-41a) charged, in three counts, a conspiracy to fix prices and to exclude competition in the broad spectrum antibiotic market composed of Aureomycin, Terramycin, Chloromycetin, and tetracycline. One of the "substantial terms" alleged in Count One was that:

> "(d) The sale of broad spectrum antibiotic Products by the defendant companies and the co-conspirator companies be at substantially identical and non-competitive prices" (33a).

This allegation, repeated by adoption in Count Two, does not raise the issue of "reasonableness" of prices or profits.

The "means and methods" allegations posed a different accusation. These were common to all three counts (33a-35a, 38a, 40a). They alleged in part:

> (a) As to the period when no claim of conspiracy between any of the defendants is made, *i.e.*, pre-November, 1953:
>
> That "Pfizer and Cyanamid maintained substantially identical, non-competitive and *unreasonably high* prices on Terramycin Products and Aureomycin Products, respectively" (35a, ¶ 46(j), emphasis added).
>
> (b) As to the period when no claim of conspiracy as to Bristol is made, *i.e.*, November 1953-December 1955; and also
>
> (c) As to the period shortly before and shortly after the alleged conspiracy is claimed to have been formed, *i.e.*, November, 1953:

> That "Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its Tetracycline Products on the market at prices which were substantially identical with each other and which conformed to the non-competitive prices of Terramycin Products and Aureomycin Products in effect as of November 1953, and all these companies maintained such substantially identical, non-competitive and *unreasonably high* prices until at least July 1960" (35a, ¶ 46(k), emphasis added).

The "background" allegations of the indictment stated that as of November 1953 Pfizer and Cyanamid were making "unreasonably high" profits (32a, ¶ 42). As "effects" of the claimed conspiracy, it was also alleged that the defendants made "unreasonably high" profits (36a, ¶ 49(d), (e)).*

It was undisputed, as the court of appeals observed, that "[t]here had been price stability between aureomycin, terramycin and chloromycetin for several years prior to the alleged conspiracy" (12588a, 426 F.2d at 35). Between 1949 and 1951 each of four general price reductions (totalling about 65%) had been met promptly by the other sellers (2746a-48a, 6757a, 6837a). From 1951 to 1953 there were no reductions. Cyanamid brought tetracycline to the market in November 1953 at prices equalling those then prevailing for equivalent dosages of the other three broad spectrums (6736a-52a). Pfizer met this market price when it introduced its tetracycline (6765a-70a). In the ensuing period, when they were not claimed to be conspirators, Bristol, Squibb and Upjohn in turn entered the market, each at prices which met the existing level (6771a-6835a).

Thus the charge was that for two years before Cyanamid and Pfizer are claimed to have conspired, each unilaterally charged "unreasonable" prices as a means or method to further a yet unformed conspiracy with respect to a yet

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* A pretrial motion to strike all the allegations of "unreasonably high" prices and profits as prejudicial surplusage was denied (356a-60a; 217 F.Supp. 199).

unintroduced drug; and that for the better part of two years before they are claimed to have become conspirators, Bristol, Squibb and Upjohn each unilaterally charged "unreasonable" prices as a means or method to further a conspiracy to which they were not parties.

**B. "The pattern which the trial took."**

In reversing, the court of appeals laid emphasis on "the pattern which the trial took" (12618a, 437 F.2d at 959). What was that pattern?

The court of appeals, in its condensation of the 12,583 page record, concentrated on what it arrayed as "the determinative facts" (12587a, 426 F.2d at 34). The court's description of the trial (12593a, 426 F.2d at 37-38) (a) started with the preliminary instructions of the trial court, preceding counsel's openings, in which the court, to provide a "framework" to "organize" the evidence, alerted the jurors to the charge that the conspiracy included the "creation . . . of unreasonably high prices;" (b) pointed up the stress in the government's opening upon "enormous" profits derived by comparing partial (factory) costs and selling prices—statements promptly challenged by motion for mistrial (12594a, 426 F.2d at 38); (c) noted the "vast amount of testimony and scores of exhibits relating to factory production costs and alleged profits," all offered in the "early weeks of trial," all objected to, all made the basis of motions to strike (12594a, 426 F.2d at 38); (d) reviewed, under a specific heading, the government's summation as to its claim of "unreasonably high profits" (12549a, 426 F.2d at 38); and (e) in this context scrutinized the adequacy and correctness of the charge to the jury.

This summary may helpfully be expanded somewhat. The jury was selected on October 23 and 24, 1967. The court's preliminary instructions stressed the accusation of

"unreasonably high prices" both as a means and as an effect of the alleged conspiracy (1468a).

The government then made an extensive opening statement (1476a-1500a). It pointed out that "[t]he conspiracy is alleged to have started in November, 1953" (1482a), as a result of "a meeting [which] took place between Mr. McKeen of Pfizer and Mr. Malcolm of Cyanamid (1484a)." The climax of the opening was to compare production costs with prices to retailers, and to assert that there were "enormous profits" and "huge bulk profit" (1498a).

The prosecution started its case by offering voluminous evidence concerning production costs and alleged profits. Though no evidence was offered purporting to establish what level of prices and profits would have been "reasonable" in the prosecution's view, the stipulated facts as to the price changes and the records as to "standard" or actual factory costs were claimed to show "unreasonably high" prices and profits. By pretrial and trial motions, objections, requests and exceptions, the defendants unsuccessfully sought throughout the proceedings to prevent the jury's being diverted to issues, which defendants maintained were inflammatory, as to whether prices and profits were "unreasonably high."

The prosecution rested on December 8, 1967. On December 15, 1967 Pfizer briefly recalled one witness and rested. Cyanamid elected to rest "on the record made in the court to date" (4601a). Bristol also rested. Thereafter, over defendants' objections (4606a-14a), the trial court delayed submission of the case to the jury for almost two weeks.

In his summation, the prosecutor heavily stressed the charges of "unreasonably high" prices and profits and of patent fraud. He asserted that the difference between factory production cost and ultimate selling prices—described by him as a "2000 per cent mark-up"—should be viewed as profit (4851a-52a). He asserted repeatedly that the jury

could infer conspiracy from the fact that prices had "not changed" for a period of almost nine years (4841a, 4847a, 4848a, 4853a), which of course included the two years before the claimed inception of the alleged conspiracy. The level of prices during the entire period was tied to the claim of "unreasonably high" profits based on factory costs, by a ringing ipse dixit that ". . . when the prices charged are as high as they are here compared to production cost, then the profits that flow from those prices are unreasonably high profits" (4847a).

The trial court on December 28 delivered its charge to the jury, the defects of which were pointed out by the court of appeals. On the night of December 29, the Friday preceding New Year's weekend, the jury returned its verdict.

### C. Impropriety of the emphasis on the issue of "unreasonably high" prices and profits.

As noted above, the words "unreasonably high" do not appear in the charging paragraphs of the indictment but only in the "means and methods" and "effects" allegations. The draftsmen of the indictment obviously recognized that if there were, as alleged, a "continuing agreement and concert of action" to maintain "substantially identical and noncompetitive prices," it was immaterial at what level those prices were fixed. It is firmly established that the "reasonableness" or "unreasonableness" of prices is not a proper subject for consideration by a jury in a Sherman Act price fixing case. *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940). Language from *Trenton Potteries* is pertinent:

> "The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. . . . [I]n the absence of express legislation requiring it, we should hesitate

> to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies" (273 U. S. at 397-98).

In this trial, the prosecution from opening statement through the evidence and in the closing arguments, with iteration and reiteration to satiety, drummed out its accusation of "unreasonable" prices and profits. These were explicit assertions and the court of appeals did no more than follow the teaching of this Court when it found that such accusations were pregnant with prejudicial tendency.

The "difference between legal and illegal conduct" in this case was being determined in the context of a criminal proceeding. The injection into the jury's consideration in a criminal case of an issue of "reasonableness" was particularly fraught with the danger of prejudice, as indicated by Donald F. Turner in a leading article,* where he referred to the above quotation from the *Trenton Potteries* opinion, as follows:

> "It should again be noted that the Sherman Act is a criminal as well as a civil statute. Though vagueness has become an accepted feature of Sherman Act law in spite of its dual character, the vagueness of 'reasonable' or 'competitive' price seems to go well beyond what is encountered in other antitrust problems" (75 Harv. L. Rev. at 670-71, n. 20).

Not unnaturally, the trial judge was unable to formulate any meaningful standard, in his charge to the jury, by which it was to determine whether prices and profits were "unreasonably high." The trial judge had been led to admit

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* Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962).

the evidence, though he was unsure on the point, and he solicited the prosecution's aid in handling it with the jury (1804a-05a). The prosecution's original requests (5223a-58a) did not touch the point; and the supplemental requests (5282a-86a) did not ask or propose the instructions which were given by the court. In denying post-trial motions for acquittal or a new trial, the trial judge criticized (6455a) the defendants for not submitting proposed instructions on a subject they considered immaterial and prejudicial,* but the charge as given was the work of the judge himself.

The petitioner's brief (Br. at 43-44) quotes a part, but less than one-third, of the lengthy charge relating to allegedly "unreasonably high" prices (4993a-99a). The part omitted included the fatally erroneous direction to the jury that if it should conclude that "the prices charged and the profits earned by the defendants were unusual or artificial or extraordinary or unreasonable" (4997a), this could be deemed evidence of price conspiracy, of conspiracy to monopolize, and of monopolization, as charged in the three counts of the indictment. No standard was provided. The jurors were left to apply these terms in any manner suggested by their own prejudices or predilections.** With the background of years of extrajudicial emotional public accusations that drug prices and profits were "unreasonably high," an instruction which so overstressed the matter without defining some standard was clearly prejudicial.

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* Cyanamid did submit a request which, while not acceptable to the judge, reflected the minimum curative treatment that could be originally appropriate (5297a-5303a).

** *Cf.* the lack of any objective standard in the approach of the dissenting opinion: "when profits were so enormous. . . ." Through the pertinent years 1953-1961 inclusive, the Lederle Division of Cyanamid averaged 16.9% net earnings after income tax on its sales as a whole (GX 872, 873 at 10226a-41a) as against annual budget objectives of 15% (2070a). At what point lower than this would the dissent have deemed profits no longer probatively "enormous"? No hint is given in the dissenting opinion.

The petitioner, as it has earlier, urges that the trial judge did not act improperly in admitting evidence of standard factory costs and in allowing the prosecution to argue as if the entire spread between factory costs and selling prices were profit, although evidence of additional costs was available to the government. The petitioner asserts that the defendants could have offered such additional evidence in defense. If any cost and profit evidence was to be admitted in the prosecution's case, however, complete proof should have been required, as it is in income tax cases where the government employs the "net worth" method as circumstantial evidence of understatement of income. *Holland* v. *United States,* 348 U. S. 121, 135, 137 (1954). The position taken by the trial court and urged by the petitioner would require the defendants to offer a defense which would further emphasize the effect of the inflammatory claims, and would further divert the jury in a prejudicial manner from the true issue of whether a conspiracy had been established.

The treatment of the subject of price and profit levels must be considered in the light of the public atmosphere resulting from extraneous publicity. We have described this in some detail in our counter statement. The extent and nature of the publicity were brought to the trial court's attention before, during and after the trial. In denying defendants' post-trial motions for acquittal or a new trial, the judge indicated a view that the jury had not been affected, and said (n. 5, 6468a) that there was "nothing here like the lurid circumstances, for example, in *Sheppard* v. *Maxwell,* 384 U. S. 333 (1966), and *Irwin* v. *Dowd,* 366 U. S. 717 (1961)."

The effect of the publicity was perhaps subtler than in the cited cases, but it greatly enhanced the prejudicial effect of the overemphasis on the claims relating to price levels. The public from which the jury came had been subjected

for years to repeated accusations reported in the press and other media that drug companies, including the defendants, had made reprehensibly excessive profits at the expense of sick people. Even if this were true, of course "guilt" of "profiteering" would not establish that the defendants were guilty of the conspiracy with which they were charged, but the extrajudicial publicity had an inevitable tendency to divert attention from the actual charges. Against this background, the stress in the indictment, in the evidence and summation, and in the judge's charge on the claims of "unreasonably high" prices and profits especially obscured the fact that what the jury was to decide was whether the defendants had conspired, not whether they had made "too much" money.

The petitioner's brief argues (Br. at 39-42) that evidence of "high" price and profit levels is admissible, but that is not the issue.* The court of appeals did not pass upon the question as to whether the evidence was inadmissible; the reversal was based on the handling of the matter in light of the overall circumstances with the result that the defendants were denied a fair trial.

Throughout the proceedings there has been a somewhat muted defense by the petitioner of the use of claims of excessive profits by asserting the relevance of this as showing monopoly power (Br. at 42). This approach ignores the fact that the products involved were covered by patents which conferred a monopoly. It was unnecessary for the prosecution to offer more as proof of monopoly power than to show the existence of the patents and the standing in the relevant market of the firms owning them. All facts neces-

* The petitioner's brief dubs the evidence relating to allegations of "unreasonably high prices and profits" as being "admittedly relevant" (Br. at 39). On the contrary, the basic objection to this evidence covers more than three printed pages (1689a-92a) and was asserted repeatedly during the trial by reference (with the trial court's permission).

sary for this were stipulated, and the contention that the admitted factual situation resulted in a conspiratorial monopoly was a matter for argument. What the court of appeals referred to as the "inflammatory issue," of whether as a result of the situation the defendants made "unreasonably high" profits, was superfluous. Its injection, in view of the background of publicity, the use of the spread between factory costs and selling prices as though it were all "profit," and the emphasis on the matter in the trial court's instructions, recalls to mind the comment of this Court in *Fiswick* v. *United States,* 329 U. S. 211, 218 (1946): "Though we assume there was enough evidence to go to the jury on the existence of that conspiracy, the case was one which a prosecutor would be anxious to bolster." The penalty of the effort to bolster the weak case here presented was to produce an atmosphere in which the defendants were deprived of a fair trial.

## III.

**The excessive emphasis on uniformity and rigidity of published prices, weighed in the light of the facts of this case and of the theory adopted by the trial court, denied the defendants a fair trial.**

The petitioner's brief says that the defendants and alleged co-conspirators "held to virtually the same prices . . . from six to ten years" (Br. at 37), refers to "ten years of utterly static pricing" (Br. at 48, n. 24) and urges that the fact that "pricing would continue so static so long under such circumstances is strong evidence of an agreement or understanding . . ." (Br. at 88). The references to "static" prices are to the fact that published prices of broad spectrum antibiotics to wholesalers and retailers and

private hospitals did not change substantially from October 1951 to July 1960.*

This was a market with only a small number of sellers—an oligopoly. Prices in such a market incline to be uniform and somewhat rigid. *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 363 (1963); *United States* v. *Aluminum Co. of America*, 377 U. S. 271, 280 (1964). As the Court said in the *Philadelphia National Bank* case, it is "common ground among most economists" that competition is likely to be greatest when there are many sellers. The converse proposition that when there are few sellers price competition is likely to be less, without agreement, is a necessary corollary.

In addition to being an oligopoly, the market involved is an inelastic one. The total demand for prescription drugs is dependent on the incidence of illness (2754a-55a), and the demand for a particular brand of antibiotic or other drug depends on the prescriptions of doctors and not on the purchasers' choices (1574a-75a, 2753a). Because of these facts, demand is not responsive to price changes.

The authors of the petitioner's brief quote (Br. at 48, n. 24), from an opinion of a court of appeals in a case reviewing a decision of the FPC, a passage stating that firms in an oligopoly market do not always seek or attain uniform monopoly price.** In contexts other than this case, the

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* The statement of facts in the petitioner's brief correctly states this to be the period (Br. at 23-24). The "ten years" referred to in the argument portions of the petitioner's brief quoted above is therefore somewhat exaggerated, since the period was less than nine years.

The petitioner's brief in the court of appeals ("G.Br.Ct.A.") conceded that in the CCS, Federal, and private hospital markets the actual prices were not uniform (G.Br.Ct.A. at 7, 16).

** *Northern Natural Gas Co.* v. *FPC*, 399 F.2d 953 (D.C. Cir. 1968). In the portion of the opinion in the *Northern Natural Gas* case quoted by the petitioner, the court said that one seller may believe he can maximize his profits by expanding his total sales rather than taking a maximum profit on each sale. Because of the inelasticity of the demand for prescription drugs a rational seller of these products could not believe this.

Justice Department itself has recognized that oligopoly pricing does tend to be uniform and rigid. In guidelines it issued in 1968 for determining the legality of mergers, the Department of Justice noted that a concentrated market structure "tends to discourage vigorous price competition" (1 Trade Reg. Rep. ¶ 4430, at p. 6682 (1968)).

In *United States* v. *Von's Grocery Co.*, 384 U. S. 270 (1966), a merger case, the government's brief in this Court stated that:

> ". . . Where the major sellers in a market are few, a price cut by one is likely to have so drastic and immediate an adverse effect upon the sales of the others as to compel them to respond promptly with matching cuts, thereby wiping out any competitive advantage won by the initiator of the reduction. Realizing this, competitors in an oligopolistic market have little incentive to cut prices. Oligopoly thus promotes price rigidity and discourages vigorous price competition, and in so doing tends to direct rivalry into other channels.
>
> ". . . When a few firms account for a large proportion of the sales of a market, each is likely to make his pricing decisions with conscious reference to the pricing policies of the others, and to be reluctant to initiate price reductions." (Gov't Br. in *Von's Grocery*, 21-22, 34-35)*

A tremendous volume of legal and economic literature has dealt with pricing in an oligopoly situation and with "conscious parallelism." One clear statement of the principle that price behavior may be "non-competitive" in an economic sense, without being the result of unlawful agreement, appears in the Turner article, *supra* p. 23, which was

* Justice Stewart, dissenting in *Von's Grocery*, 384 U. S. at 301, said that the only consistency he could find in the precedents under § 7 of the Clayton Act was that "the Government always wins." The disavowal in this case of the economic views the government has espoused in merger cases appears to be an effort to extend this kind of "consistency" to a criminal Sherman Act case.

published after the indictment. The author, trained both as economist and lawyer, was head of the Antitrust Division of the Justice Department at the time of the trial of this case. He wrote:

> "[T]here is fair ground for argument that oligopoly price behavior can be described as individual behavior—rational individual decision in the light of relevant economic facts—as well as it can be described as 'agreement.' It can readily be said that each seller in this situation, in refraining from price competition, is not agreeing with his competitors but simply throwing their probable decisions into his price calculus as impersonal market facts. . . . We could say that each seller has simply decided individually, perhaps after bitter experience, that it is more profitable not to indulge in price competition under any but the most pressing circumstances, appealing as price cutting might appear to be from a less experienced viewpoint." 75 Harv. L. Rev. at 666.

> "Parallelism will tend to prove that 'something more' exists only if the other evidence in the case suggests that the hypothesis of lawful oligopoly pricing—non-competitive prices resulting simply from recognized interdependence—does not account for all the facts. If that hypothesis is equally plausible on the facts, a case should be dismissed for the time-honored reason that a party with the burden of proof cannot be allowed to obtain a verdict or judgment that can be reached only by speculation." 75 Harv. L. Rev. at 672.

In the present case, there was, in the words of Professor Turner, a "rational calculation by each seller of what the consequences of his price decision would be, taking into account the probable or virtually certain reaction of his competitors" (75 Harv. L. Rev. at 661). There were four price reductions in the 1949-51 period, when it was not claimed there was a price agreement. Each reduction was

promptly met by all sellers, and no increase in sales appeared to result from the reductions.* A "rational calculation," therefore, would lead to independent decisions not to make further reductions.

Dr. Malcolm, the executive of Cyanamid responsible for pricing, described Cyanamid's experience with the four 1949-1951 price reductions and his recognition of the fact that usage of antibiotics depended on the incidence of disease and not on price. This taught him that any Cyanamid reduction would be met promptly by competitors, and that Cyanamid could not realize any economic advantage from price cuts (2748a-49a, 2754a-55a, 2801a). In light of this experience and his target net profit objective, Malcolm determined not to make further general price reductions unless either his company would gain some economic advantage thereby, or he was forced to meet reductions initiated by competitors (2745a-46a, 2749a, 2754a-55a).

The argument that the price decisions were independent draws support from instances where the same price policies were followed under conditions where they were not claimed to be the result of conspiracy. Parke, Davis had the same "static" and uniform prices as the alleged conspirators, but admittedly without being a conspirator, throughout the 1951-60 period. Pfizer and Cyanamid, in the 1951-53 period before the alleged conspiracy was claimed to have been formed, had identical and "static" prices. So, too, did Bristol, Squibb and Upjohn in the 1954-55 period before they were claimed to have joined the alleged conspiracy.

All these facts logically pointed to a conclusion that the defendants' conduct was not the result of conspiracy, but the trial judge's instructions discouraged the jury's reaching that conclusion. He told the jury, for example, to consider the evidence as to price stability "over substantial

* After the fourth reduction, in October, 1951, Cyanamid's 1952 sales were slightly lower than in 1951 (6848a) and total broad spectrum sales were only slightly higher (6848a-49a, 6853a).

periods of time" (4992a), without noting that in much of the time involved there was stability not claimed to have resulted from conspiracy. (See requests to charge, 5536a, 5195a; exceptions, 5012a-13a, 5040a.) In the prosecutor's summation he had stressed the long period of unchanged prices but had not mentioned that a substantial part of the period was before the alleged conspiracy. Both summation and charge thus tended to obscure the similarity of conduct outside and within the alleged conspiratorial period.

## IV.

### The trial court's treatment of the Parke, Davis evidence was prejudicial.

A major instance in which the trial court's instructions diverted the jury's attention from the fact that concededly non-conspiratorial conduct might indicate that similar conduct by defendants also was innocent involved the evidence as to the conduct of Parke, Davis, which was the manufacturer of Chloromycetin, one of the four broad spectrum antibiotics, and which was concededly not a member of the alleged conspiracy. In the opinion denying rehearing, the court of appeals said that ". . . it seems impossible to deny that the treatment which the charge gave to the highly important Parke-Davis defense alone might well have prejudiced the jury's judgment" (12618a, 437 F.2d at 958-59).

The importance of the evidence relating to Parke, Davis, which included testimony and stipulated facts, was enhanced by other aspects of the instructions. The trial court instructed the jury that it did not have to find unlawful conspiracy entered into at any specific meetings, places or times (4951a, 4952a, 4963a-64a, 5000a), so that it might convict on the basis of inferences from the general course of conduct of the alleged conspirators. This made

highly significant the evidence of the like course of conduct of the admitted non-conspirator, Parke, Davis. The manner in which the trial court treated this evidence deprived the defendants of its logical force.

The petitioner urges (Br. at 60-65) that defendants were not improperly restricted by the trial court in arguments to the jury about Parke, Davis. Prior to the closing arguments, however, the trial judge expressed his reservations, *sua sponte*, as to whether the defendants should be allowed to argue at all about Parke, Davis (4543a). Later he flatly stated that he would stop any argument that Parke, Davis could be presumed innocent, and added that this would also apply to any reference to a presumption that business is conducted lawfully (4646a-47a).

As the petitioner states (Br. at 61), the trial court explained the last ruling on the basis that "a layering of other presumptions is not useful" (4647a). This confused the concepts of inferences and presumptions. The government offered the testimony of the individual who was president of Parke, Davis during the period, presumably on the theory that it might provide a basis for inferences favorable to the government and adverse to the defendants. Cross-examination, however, elicited testimony which would strongly support inferences favorable to the defense. Outside the presence of the jury, the government admitted that it did not contend that Parke, Davis was a conspirator, and affirmatively and unequivocally conceded that it was not (4527a). The petitioner mentions this admission but fails to point out that the jury was never told of that crucial admission, which went far beyond the equivocal statement that Parke, Davis "is not *alleged*" to be a conspirator (Br. at 71, emphasis added).*

* The petitioner (Br. at 70) suggests that there were "constant reminders at the trial that Parke, Davis was not *considered* a conspirator" (emphasis added), but fails to cite a single reference. Where references exist to show that a significant fact has been called

Certainly a defense argument of logical inferences to be drawn from the conduct of an admittedly innocent individual or company, in the course of which reference might be made to the basic presumption that one is innocent until proven guilty, cannot be described in any accurate sense as "layering" one presumption on another. This logical fallacy in the trial court's approach undoubtedly contributed to the error which it committed.

The petitioner makes the further remarkable contention (Br. at 64-65) that to allow the defense to make an argument relating to Parke, Davis which mentioned the presumption of innocence might have confused the jury by undermining the fundamental principle that an indictment is neutral and that the government must overcome the presumption of the defendants' innocence. The trial court could and did (4943a-44a) instruct the jury that an indictment is not evidence of guilt. Nothing in the record even hints at support for the petitioner's argument that the court's ruling was based on a paternal anxiety to protect the defendants from possible adverse effects of arguments their counsel strongly believed they were entitled to make.

The court of appeals held (12604a-05a, 426 F.2d at 44-45) that the trial judge erred in refusing to give Cyanamid's requested instruction which would have pointed out that Parke, Davis had a patent on Chloromycetin, that it granted no licenses and did not sell in bulk, that it had 23.8 percent of the broad spectrum market,* that its prices were substantially the same as those of the defendants, and that it was not claimed that the conduct of Parke, Davis was pursuant to conspiracy. The petitioner seeks to sup-

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to the jury's attention, the government is able to cite them: e.g., the twenty-one references cited, Br. at 81, as to the date Bristol allegedly joined the alleged conspiracy.

* In the period 1954-1961 Parke, Davis' sales of its broad spectrum antibiotic products totalled $267,000,000 (GX 875, 10244a).

port the trial court's refusal to give the instruction on the ground that it would have been one-sided because it did not point out the differences between the conduct of Parke, Davis and that of defendants (Br. at 65-66).

The "differences" which the petitioner claims existed resolve themselves in essence to the single fact that Parke, Davis was not involved in the manufacture or sale of tetracycline (Br. at 58-59). Parke, Davis, however, was an important factor in the broad spectrum antibiotic market as defined by the indictment (28a, ¶18). The record shows that Chloromycetin was directly competitive with tetracycline, and that it was the view of Parke, Davis that it could not exact higher prices than those charged for tetracycline (3357a-58a).

The petitioner's brief asserts that the defendants contend that ". . . the fact that a non-conspirator did some of the same things they did showed that their actions did not result from conspiracy" (Br. at 59). Aside from the fact that it was not defendants' burden to prove themselves innocent, the "some of the same things" done by Parke, Davis were things which, when done by defendants, were in themselves claimed to support an inference of conspiracy: namely, the charging of the same stable prices, refusal to license, and refusal to sell in bulk. Obviously, the thrust of the defendants' position and of the proposed instructions was that the prosecution's plea to infer guilt from certain undisputed conduct of the alleged conspirators might properly be rejected when the government's own evidence and stipulated facts demonstrated that the same conduct had been engaged in by an admittedly innocent competitor as a result of its independent decision.

The petitioner says that the requested and refused instruction carried an implication that conduct of the defendants that was similar to that of Parke, Davis "was not to be considered as proof of the conspiracy charged"

(Br. at 55). The conduct of the defendants could of course be argued as a basis for an inference against them, and the prosecution's freedom to labor that argument (which it did) was in no way restricted. The clash was as to the weight of the evidence, and it was precisely here that the trial court's error took hold. The stifling of legitimate argument and the refusal of appropriate jury instructions on evidence which was "all-important to the defendants" (12604a, 426 F.2d at 44) was a significant aspect of an unfair trial.

Equally without merit is the argument (Br. at 67) that the trial court was justified in refusing the requested instruction relating to Parke, Davis because the court had discretion as to whether to comment on the evidence. The petitioner quotes from an opinion which in turn quoted from *Quercia* v. *United States*, 289 U. S. 466, 469 (1933). The latter case, however, actually stands for the proposition that when a trial judge elects to comment on the evidence, as here, he must do so impartially. In the present case, the judge commented on the Parke, Davis evidence in such a way as to deprive the defendants of the benefit of its consideration by the jury as consistent with inferences favorable to the defense.

As the court of appeals concluded (12604a, 426 F.2d at 44), the charge which the trial court gave had the effect of suggesting to the jury that Parke, Davis might not have been innocent, and of foreclosing what weight in favor of the defendants the jury might have given to the Parke, Davis evidence. The judge told the jury in the same sentence that Parke, Davis was not on trial, and that the verdict concerning the defendants who were on trial must be based on "the law and the evidence relating to them" (5002a).*

* The petitioner omits five words in its quotation of the court's charge on this subject (Br. at 69). What the trial court said was

The petitioner (Br. at 71) is critical because the defendants did not specifically note, in excepting to the charge, the possibility that the jury might have thought Parke, Davis was not innocent. The defendants excepted to the entire charge relating to Parke, Davis. The procedural function of an exception is to afford the trial court notice of error in time to permit its correction. The whole colloquy on the scope of argument and the exceptions to the charge demonstrates conclusively that the trial court knew exactly where the defendants asserted his instructions and his actions were in error.

In its final argument relating to Parke, Davis the petitioner asserts that the jury's request for and receipt of the evidence during its deliberations indicates that the instruction of the trial court was not understood by the jurors as forbidding its consideration of the evidence (Br. at 72-73). As this Court has pointed out, however, a request by the jury during its deliberation is a compelling demonstration of the importance to the jurors of the evidence involved. *Fiswick* v. *United States*, 329 U. S. 211, 220 (1946). The point is not that the charge forbade consideration, but that it was calculated to prevent the jury's attaching to the evidence the weight which it logically deserved.

Neither the petitioner nor the defendants can know what occurred in the jury room. Shortly after they retired, the jurors requested a copy of the charge (5051a, 5060a), and each juror was given a copy. Cyanamid's counsel consented with stated reluctance due to the risk of misinterpretation in the light of the comments on the evidence which were included in the instructions (5052a-53a). The jury re-

"There is no profit here in speculating as to why Parke, Davis was not indicted. Parke, Davis is not on trial here . . . ." etc. (5002a). This is materially different from the quote in the brief: "There is no profit here in speculating as to why Parke, Davis . . . is not on trial here."

quested the Parke, Davis evidence by referring to page and line numbers of the court's charge (5071a). Obviously the jurors were studying the instructions in connection with the requests. In the next paragraph of the charge after the one to which the request referred (5001a), the trial court made the remarks which the court of appeals found prejudicial.

A reasonable inference, the accuracy of which cannot be proved or disproved, would be that some juror or jurors had suggested that the Parke, Davis evidence indicated defendants' innocence. Others pressing for a conclusion of guilt well may have pointed out that the judge had hinted that Parke, Davis might not be innocent, and had instructed the jury to restrict itself to evidence concerning the defendants' conduct.

The dissenting judge in the court of appeals conceded that the defendants' construction of the charge as detracting from the force of the evidence concerning Parke, Davis was a "possible construction." He expressed the view, however, that "that possibility seems hardly serious enough to warrant reversal" (12614a-15a, 426 F.2d at 50). Thus the dissent admitted that the trial judge instructed the jury in a way susceptible of a construction by the jurors under which they would not accord proper weight to evidence favorable to the defense. This dissent was before the judges of the court of appeals who considered whether a reargument *en banc* would be granted. The majority of the judges participating concurred on the basis of the original and the supplemental majority opinions, the latter categorically concluding that ". . . it seems impossible to deny that the treatment the charge gave to the highly important Parke-Davis defense alone might well have prejudiced the jury's judgment" (12618a, 437 F.2d at 958-59).

## V.

**The trial court's treatment of the testimony of the defendants' officers was prejudicial.**

We have pointed out above the undisputed evidence that defendants, at times when they were not claimed to have been in a conspiracy, acted in a manner identical to their conduct during the period of the alleged conspiracy. This identity of admittedly innocent and allegedly guilty conduct was an important defense point. Therefore, it was essential that the probative weight of the explanations of the independent reasons for the actions, given from the stand by those responsible for the defendants' conduct, not be undermined by an erroneous charge.

The government in a detailed bill of particulars spelled out its theory of the case, which was that the alleged conspiracy had been entered into at specific meetings of identified individuals, who were the defendants' principal officials. This did not mean—and the defendants do not assert—that the government had to show an *express* agreement. The second opinion of the court of appeals clearly states that the reversal was not based on the view that an *express* agreement must be established. The accusation remains, however, that at specified meetings the defendants arrived at agreements, *express or implied, overt or tacit,* allegedly constituting a conspiracy. The petitioner plainly recognizes that this correctly interprets the opinions of the court of appeals, for in its discussion of the Pfizer-Cyanamid agreements that resulted from the November, 1953 meetings, the petitioner ". . . contends here that it was also understood between Pfizer and Cyanamid that neither would allow other companies into the market and that they would not compete with one another with respect to price" (Br. at 12).

In the opening statement, throughout the trial, and in the summation, the government consistently adhered to this

theory that the alleged conspiracy was entered into through identified individuals* at specified meetings (1106a-07a, 1130a-31a, 1482a, 1484a, 1495a-96a, 4220a-21a, 4829a-31a, 4853a-54a, 4867a, 4999a-5000a).** It was vitally important to the defendants that the jury be not misled or confused as to the significance and weight of the testimony of these individuals. The trial judge's charge told the jury, however, that the final answer to the central question of conspiracy "must be based upon the actual conduct of the defendants during the period covered by the indictment" (5000a), thus saying that inferences from market behavior rather than testimonial explanations of the reasons for the behavior and of what was said and done at the meetings must be the basis for the decision.

Cyanamid rested without offering evidence in reliance upon the rule of law that a case will be presented to the jury by the trial court's charge in accordance with the theory expounded in the indictment and the government's bill of particulars, which here was pressed by the prosecution throughout the trial. The court of appeals noted (12597a, 426 F.2d at 40) that requests for instructions which would have told the jury that it could convict only on the basis of the charges made in the indictment as supplemented by the bill of particulars were denied.

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* The three principal executives who testified had been indicted with their companies, but the indictment was dismissed as to them on the ground that they had received immunity by being required to testify before another grand jury, 422a, 245 F. Supp. 801 (S.D.N.Y. 1965). This permitted the government to call them as witnesses at the trial.

** The government continued to adhere to this theory in the court of appeals: "The agreement between Pfizer and Cyanamid to settle the first tetracycline interference was the focal point for the inception of the conspiracy" (G. Br. Ct. A. 69). The agreement was negotiated in November, 1953 at meetings attended by McKeen and Powers of Pfizer, Malcolm and Martin of Cyanamid (G. Br. Ct. A. 22-23). All of these individuals testified. "The entry of Bristol and its bulk customers into the conspiracy in December 1955 was made possible by the Broady wire-tapping episode" (G. Br. Ct. A. 71). The participants in these discussions—McKeen of Pfizer, Schwartz of Bristol—"testified extensively" as to the motivations and the discussions (G. Br. Ct. A. 56).

Not only did the trial judge refuse to give the requested instructions, but he included in the charge general statements indicating to the jury that it could ignore or discount the testimony as to the meetings and convict on vague and different theories. In instructions quoted by the court of appeals (12595a-97a, 426 F.2d at 38), the trial court stated that precise dates or extension of the conspiracy need not be proved, and that there need not have been any meetings or exchange of words in order to establish agreement. As abstract propositions of law such assertions may be correct, but in the context of the theory espoused by the government long before and during all the weeks of the trial they were fatally misleading.

As the court of appeals recognized, the charge of the trial court "slighted and rather deprecated the testimony about the meetings" (12598a, 426 F.2d at 40). The second opinion again referred to the charge with respect to the officers' testimony as error (12618a, 437 F.2d at 959). No basis exists to support the implication of the petitioners (Br. at 52) that the court of appeals had in some way withdrawn its criticism of the treatment of this testimony.

The trial court referred to the officers as having denied "in broad terms" the existence of conspiratorial agreements and understandings and as making "assertions of innocence" (5000a-01a). As the court of appeals noted (12598a, 426 F.2d at 40), however, the officers testified at length concerning the business problems created by the tetracycline patent situation, and specifically stated what particular subjects were and what others were not discussed at meetings. The petitioner itself recognizes (Br. at 49-50) that the denials were specific, and that the officers testified to the business reasons for their actions.

The trial court's charge asserted that ". . . the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter" (5001a).

This suggested that the court saw some inconsistency between the officers' testimony at the trial as to the occasions for, scope of discussion at, and results of the crucial meetings and some other (unidentified) evidence as to "the things the defendants did and said at the time." The petitioner does not point out any basis in the record for such an interpretation of the record, and there was in fact no such inconsistency.

Finally, the lower court stated that the "assertions of innocence" might reflect "partly legal as well as factual contentions." There was no explanation of what might be "legal" and what "factual." Since the jury had been told at the very beginning of the charge that it was its duty to follow the court's instructions on the law (4941a), it was left uncertain as to what part of the testimony it could accept.

The petitioner now seeks to defend these instructions on the theory that "[w]hether an 'agreement' illegal under the Sherman Act has been made is a mixed question of fact and law" (Br. at 51). Opinions of this Court in four civil non-jury government Sherman Act cases are cited. The opinions indicate that the "law" part of the "mixed question of fact and law" was regarded as being the ultimate issue of whether there was or was not a conspiracy. *See, e.g., United States* v. *General Motors Corp.*, 384 U. S. 127, 141-42, n. 16 (1966). This rationale was adopted to explain that the provision of Rule 52(a) of the Federal Rules of Civil Procedure that findings of fact shall not be set aside unless "clearly erroneous" did not prevent reversal of a trial judge's conclusion that, on the basis of underlying facts he had found, no conspiracy had been shown.

The decisions cited are not apposite in the present case, which is not a civil but rather a criminal proceeding in which we are concerned with instructions to a jury of laymen. When the government elects to institute a criminal

Sherman Act case, it brings into play not only antitrust law but also basic principles applying in all criminal cases.

One such principle is that when the judge in a criminal trial instructs a jury as to matters of law, the jury should follow his instructions on such matters. *Sparf & Hansen* v. *United States*, 156 U. S. 51 (1895).* If the cases cited by the petitioner meant that the ultimate question of conspiracy is one of "law" on which a judge may charge a jury in a criminal case, the court might instruct that a conspiracy had been shown, and thus take the ultimate issue from the jury. But such a result cannot be harmonized with the more basic doctrine that a judge may not direct a verdict of guilty in a criminal case. *Sparf & Hansen* v. *United States, supra*, 156 U. S. at 105. This doctrine applies, of course, to a criminal Sherman Act case. See *Brotherhood of Carpenters* v. *United States* 330 U. S. 395, 408 (1947), where a conviction was reversed because of erroneous instructions.

The *Sparf* case rests upon a recognition that for purposes of a criminal jury trial there cannot be a "mixed question of fact and law," in the sense that the same question is to be passed upon by both judge and jury. As the jury is precluded from deciding matters of law, so the judge is precluded from deciding questions of fact. Because a jury in a criminal case can return only a general verdict of guilty or not guilty and is not required, and indeed is not per-

*In the *Sparf* case, the Court disposed of a problem as to whether juries could decide issues of law, which had been discussed and litigated with varying results in the lower federal courts for over a hundred years. See Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582, 588 (1939); *Skidmore* v. *Baltimore & O.R.R.*, 167 F.2d 54 (2d Cir.), *cert. denied*, 335 U. S. 816 (1948). The rationale of the Court was the reasonable one that if juries had the *right* to decide issues of law, there would be no general law but only diverse opinions of different juries. Although realistically juries have the *power* to disregard a judge's instructions as to the law, a rule that they should follow them at least preserves uniformity of stated legal principles.

mitted, to explain its deliberations, it is impossible to determine from a verdict whether the jury actually limited itself to issues of fact or improperly decided questions of law.* If juries are to understand and obey the admonition to follow judges' instructions as to law, those instructions must make clear the matters to which the admonition relates.

A judge in a federal criminal trial may comment on the evidence in instructions. "But he should take care to separate the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province." *Starr* v. *United States,* 153 U. S. 614, 625 (1894). This may be difficult in a case involving a question which, like that of antitrust conspiracy, can be described in the context of a civil case as a "mixed question of law and fact." In such a case, if comments are made, the issues of fact must be separated from the rules of law and care taken not to confuse the jury.

The petitioner, in attempting to defend the instructions, demonstrates the potentialities for prejudice in the unexplained statement of the trial judge that the testimony of the defendants' officials might reflect "partly legal as well as factual contentions." In a criminal jury trial the issues submitted could not properly be allowed to remain "mixed." The description of the testimony as "contentions" which might be "legal," so that their validity should not be passed upon by the jury, could naturally lead a conscientious juror to think that he should not consider the testimony at all.

The petitioner urges (Br. at 51) that the effect of the instructions as to the testimony, in which the court of appeals found error, was corrected by general statements about the credibility of witnesses and generalized instruc-

* This defect in general verdicts is discussed at length in Judge Jerome Frank's exhaustive opinion in *Skidmore* v. *Baltimore & O.R.R., supra,* in which he advocates special verdicts in civil cases as a control, but such verdicts are not available in federal criminal trials.

tions about normal independent business decisions. This ignores the vital importance to the defendants of the jury's views as to the specific testimony of the particular witnesses which was deprecated in the charge. The opinion in *Bihn* v. *United States*, 328 U.S. 633 (1947), dealt with a similar argument. The Court there said that general instructions as to reasonable doubt, which "would be adequate standing alone," did not correct an instruction that suggested a different standard with respect to a specific issue in the particular case (328 U. S. at 637).

The court of appeals recognized the propriety of devoting part of a jury charge to "necessary generalities" (12599a, 426 F.2d at 41). The basis for the holding that the instructions here were not adequate, however, was that the charge as a whole did not focus the jury's attention on the primary issue, namely, whether the participants in the crucial meetings had conspired as charged (*id.*).

The petitioner's brief, noting that officials of defendant companies in antitrust cases frequently deny illegal agreements, says that such denials "may be deliberate untruths or may rest upon the witness' honest but mistaken view of the legality of their acts" (Br. at 52). There is another alternative: that the denials may be truthful, and rest upon the witness' honest and correct view that their acts were legal. The chance that the jury would so conclude in this case was virtually eliminated by the trial judge's charge.

## VI.

**The trial court's treatment of patent matters was prejudicial.**

The court of appeals noted, with respect to the charges of conduct relating to the obtaining of the tetracycline patent, that the trial "was virtually diverted from an antitrust conspiracy case to a patent fraud case" (12599a, 426 F.2d

at 41). The Patent Office evidence at most was only indirectly relevant. Misconduct in the Patent Office was not alleged to be one of the terms of the conspiracy, but only one of the "means and methods" (34a). The government admitted that it had no evidence that the defendants had conspired to defraud the Patent Office (4135a, 4520a) and virtually conceded that it looked to the evidence primarily to create a general smear, urging in summation that it generally would "reflect on the personnel involved in some way" (4883a). The trial judge devoted a large part of his instructions to this matter. As the petitioner indicates (Br. at 56), the issues and evidence involved were technical and complex. It is unlikely that the lay jury understood them, and the net effect of the stress (as was also true of the claims of "unreasonably high" prices and profits) must have been simply to give an impression that the defendants were "bad."

The court of appeals held that the overemphasis in the charge to the jury on patent matters, like that on "unreasonably high" prices and profits, was prejudicial. It noted that ". . . nowhere was the jury told in clear language that the Patent Office proceedings were relevant only insofar as the acts of Pfizer and Cyanamid supported an inference that at the November 1953 meetings they had entered into agreements to fix prices or to exclude others" (12600a, 426 F.2d at 41).

The petitioner argues (Br. at 54) that such an instruction would have been wrong because it "improperly assumes that the conspiracy must have been expressly agreed to on those dates." This is not so; as recognized above, there need not have been an *express* agreement. The court of appeals meant, correctly, that the emphasis the trial court put on charges of allegedly improper unilateral conduct tended to divert the jury from the fact that the ultimate charge was a conspiracy which the government on every occasion dated from November, 1953.

The petitioner also urges that the defendants were not surprised by the charge on patent matters or its length because the trial judge earlier had read to them part of what he proposed to say on the subject (Br. at 57). Whether the defendants were or were not surprised by an erroneous charge seems an immaterial issue for a Supreme Court argument, but in any event, since the judge did not give the defendants his entire charge in advance, they had no way to appraise the relationship of the portion he read to them to the rest of the charge.

The exaggerated emphasis in the instructions on the aspects of the case relating to the obtaining and effect of the tetracycline patent is echoed by some statements in the conclusion to the petitioner's brief. The petitioner there refers (Br. at 89) to an "attempt to monopolize," and cites a Sixth Circuit decision affirming findings of the FTC that there were violations of Section 5 of the FTC Act in connection with procuring the patent.

This appears to be an effort to classify this as a case like *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).* In the present case, however, there was no charge of an "attempt to monopolize," but a charge of *conspiracy* to exclude competitors and fix prices. In the FTC case which the Sixth Circuit affirmed, although the Commission found unilateral violations of the FTC Act, it held that the evidence (substantially the same as that adduced in this case) did not establish conspiracy to obtain a patent by fraud on the Patent Office or to use it to exclude others (63 FTC at 1862-64).

* If the *Walker* case were pertinent, it seems clear that the trial judge here had no conception of the fact that "[t]he road to the Patent Office is so tortuous and patent litigation is usually so complex, that 'knowing and willful fraud' as the term is used in *Walker*, can mean no less than clear, convincing proof of intentional fraud involving affirmative dishonesty, 'a deliberately planned and carefully executed scheme to defraud . . . the Patent Office,'" *Cataphote Corp.* v. *DeSoto Chemical Coatings, Inc.*, 5 Trade Reg. Rep. ¶ 73,750, at 91, 177 (9th Cir. Nov. 4, 1971).

The remarks in the conclusion of the petitioner's brief in this Court would seem to indicate that counsel fail to recognize that the Patent Office proceedings were relevant only if they tended to show the conspiracy charged. The fact that the petitioner itself misses this crucial point supports the conclusion of the Second Circuit that the charge did not make it clear to the jury.

## VII.

**The cumulative effect of the various errors materially enhanced their prejudicial effect on the defendants.**

The court of appeals, having found and discussed a series of errors which individually warranted reversal, then considered their cumulative and interrelated impact. It also concluded that the errors, "when taken as a whole, were sufficient to deprive the defendants of a fair trial" (12618a, 437 F.2d at 958).

The interrelation of the various aspects of the trial court's instructions as to which the court of appeals found error was particularly damaging to the defense. This may be illustrated by drawing together three of the matters thus far considered.

The instructions relating to the officials' testimony put the case to the jury in terms of a general course of conduct rather than of the specific theory on which the government had presented its case. This made consideration by the jury of the similar conduct of Parke, Davis crucially important to the defendants, but the trial judge's charge could be read as telling the jurors not to give weight to the Parke, Davis evidence. And the great emphasis in the instructions on the charges of "profiteering" tended to make this matter one on which the jury would focus rather than on the charge of conspiracy or on the evidence which pointed to innocence.

## VIII.

**The sufficiency of the evidence to support a verdict of guilty is not the issue here, but the closeness of this case is a factor to be considered in determining whether the errors below denied the defendants a fair trial.**

The defendants throughout this long and tortuous controversy steadfastly have maintained their innocence, and continue to do so. But the question in the court of appeals was not, and the question here is not, whether the defendants are or are not guilty of the conspiracy charged in the indictment. The court of appeals found it unnecessary to pass upon the sufficiency of the evidence.*

The Court repeatedly has stated that when a jury in a criminal case has reached a guilty verdict following a trial wherein there were prejudicial errors, an appellate court should not affirm the conviction on the ground that it would itself have concluded from examination of the record that the defendant was guilty. For example, in a concurring opinion in *M. Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946), where error was found and a conviction reversed, but it was claimed that the evidence was sufficient to sustain the verdict, Mr. Justice Douglas said:

> "But it is not enough that we conclude on the whole record that a defendant is guilty [citation omitted]. The jury under our constitutional system is the tribunal selected for the ascertainment of guilt" (327 U. S. at 628).

In another opinion the following year, in *Bihn* v. *United* States, 328 U. S. 633 (1947), writing for a majority of the

* Note, however, that the court of appeals inclined to the view that there was insufficient evidence to warrant submission to the jury of the issue of a conspiracy to exclude between Bristol and Pfizer and Cyanamid (12619a, 437 F.2d at 959). The implication of that view as to Cyanamid is discussed in the next point.

Court in a case where, as here, the trial judge's instructions might have misled the jury as to a vital issue in the case, Justice Douglas stated:

> "While there was sufficient evidence for the jury, the case against petitioner was not open and shut. Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the erroneous charge. Hence we cannot say it was not prejudicial and hence treat it as a minor aberration of trivial consequence. Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historical functions of the jury under our system of government. See *Bollenbach* v. *United States*, 326 U. S. 607" (328 U. S. at 638-39).

In the cited *Bollenbach* case, the Court in dealing with an erroneous charge to a jury on the basis of which it reversed a conviction, stated that ". . . the question is not whether guilt may be spelt out of a record but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts" (326 U. S. at 614). Referring to the "harmless error" statute, the Court concluded:

> "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be" (326 U. S. at 615).

*Accord, Weiler* v. *United States*, 323 U. S. 606 at 611 (1945).

The test of whether trial errors are "harmless" has been expressed by the Court as follows:

> "[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos v. United States,* 328 U. S. 750, 765 (1946). See also *Fahy* v. *Connecticut,* 375 U. S. 85, 86-87 (1963).

Under precepts of this Court faithfully followed by the court of appeals in this case, while an appellate court should not invade the province of the jury by undertaking to convict on the basis of a view that the evidence showed guilt, the closeness of a case is an element to be considered in determining whether a trial error was harmless. The following language of *Glasser* v. *United States,* 315 U. S. 60, 67 (1942), is not limited to cases involving explicit constitutional arguments such as were there involved, but applies equally to other types of error which deprive the defendant of a fair trial:

> "• • • where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

Accordingly, in the *Kotteakos* case, *supra,* the Court said that an error in the exclusion or admission of evidence or in jury instructions might not call for reversal in the face of "other clear evidence," but that if the same error "might

turn scales otherwise level," it would not be harmless (328 U. S. at 763). Accord, *Bihn* v. *United States*, quoted *supra*.

The petitioner implicitly recognizes this principle when it argues that the evidence was "ample" (Br. at 37), that the case against respondents was "strong" (Br. at 89), and that the evidence of guilt was "substantial" (Br. at 90). The court of appeals obviously did not agree. In our counter statement, we have noted various occurrences in the course of this proceeding and the related FTC proceeding that objectively support the court of appeals' evaluation. Argument that there was an insufficiency of evidence to support a verdict of guilt beyond a reasonable doubt is not necessary. Cyanamid asserts the unquestionable soundness of the court of appeals' conclusion that under these circumstances the accuracy and internal balance of instructional comments on the evidence were of telling importance, and warranted the examination of errors to determine whether they might have contributed substantially to the result. The court of appeals concluded that they might have. This Court should uphold that conclusion.

## IX.

**There were errors of the trial court other than those for which the court of appeals reversed.**

Cyanamid and the other defendants advanced numerous contentions in addition to those on which the court of appeals based the reversal. The opinion denying rehearing made clear that the court had not rejected these points, but had not felt it necessary to reach them (12619a, 437 F.2d at 959).

An important ground centering on Bristol was also of vital significance to the other defendants. In denying rehearing, the court of appeals expressed its inclination to

the view that there was insufficient evidence to warrant submission to the jury of the issue whether Bristol had conspired with Pfizer and Cyanamid to exclude others from the tetracycline market (12619a, 437 F.2d at 959). This conclusion alone would compel a new trial, as the court of appeals observed, and it necessarily would be a new trial as to all defendants.

A proper instruction in favor of Bristol on this point would have altered the entire perspective of the case as to Cyanamid. As Bristol went out on this phase, it would carry with it its so-called co-conspirator customers Squibb and Upjohn, since they were named only because they bought in bulk from Bristol and resold in finished form. The charge of conspiracy to fix prices might or might not have remained in the case as to these companies. But even if it did, a very different market status would be presented to the jury.

Insofar as conspiracy to exclude is concerned, the jury then would be dealing with a market in which six companies were competing in the sale of substantially interchangeable broad spectrum antibiotics: Cyanamid and Pfizer, still charged with a conspiracy to exclude which would be readily seen as obviously abortive; Parke, Davis, conceded by the government not to be a conspirator; Bristol, Squibb, and Upjohn, now cleared of the charge of conspiracy to exclude. In this market, Bristol under the terms of its license from Pfizer would stand free to sell in bulk to as many customers as it chose (GX 50, 8482a).* It would be interesting to spec-

* The petitioner inadvertently implies that the Pfizer-Bristol license agreement (GX 50, 8480a-8500a) limited Bristol to its two "presently existing bulk customers" (Br. at 22). This distortion must have resulted from a failure of the brief writer to read the license which is in the record. "Bulk customer" is defined generically to include any customer buying the product and reselling under a label different from that of the seller (¶ 8, 8482a). Bristol is granted an unlimited right to grant sublicenses to an unlimited number of customers to compound, use, and sell tetracycline products (¶ 2, 8484a), subject only to the requirement of royalty payments as set for Bristol and its then existing bulk purchasers (¶ 3, 8484a-85a).

ulate as to how the petitioner would argue that Cyanamid and Pfizer then were guilty of a conspiracy to exclude when innocent Bristol had full power freely to sell in bulk to any number of potential fabricators and sellers. Since there can be no way to estimate the influence of the erroneous submission on the minds of the jurors when they were considering their verdict as to Cyanamid, reversal of course would be required. *Cf. Wheaton* v. *Sexton's Lessee*, 17 U. S. 503, 508 (1819).

Cyanamid will not lengthen this brief by a discussion of other material complaints which the court of appeals did not find it necessary to resolve. The briefs filed by Cyanamid in the court of appeals are part of the record here, and the arguments made in them on these matters will show their merit.

The careful review given the case by the court of appeals resulted in its decision that reversal of the convictions was required for the reasons it stated. The fact that there are other good reasons which the court did not reach is an additional ground for affirmance by this Court.

## CONCLUSION

The petitioner's brief in its conclusion advances three arguments:

First, it once again urges that the evidence was sufficient to show guilt (Br. at 88-89). But the basis of the reversal, as shown above, was not insufficiency of evidence but the denial of a fair trial.

Secondly, it again argues (Br. at 90) that the reversal will impair "the deterrent effect that the threat of criminal prosecution was designed to have on potential violators" of the Sherman Act. This result will arise, the petitioner contends, because the reversal was based ". . . on the theory that because the case was 'close' slight errors in the trial might have had a decisive impact on the jury. . . ."

This is an extraordinary argument, but that the petitioner is wedded to it becomes evident from the fact that it is advanced at least thrice in its brief. Initially it appears at page 36. The chord is struck again at page 46. But the argument is posed in the conclusory section of the brief in its most startling form. The petitioner there confesses in essence that the government cannot try a "large and complicated" case without either its or the court's committing "genuine errors" (Br. at 89). Decades of successful prosecutions repudiate this proposition. The petitioner pleads that a guilty verdict resting upon a trial record containing "genuine errors" is entitled to "hospitable treatment" in appellate courts where the indictment concerns "the enforcement of laws designed to preserve free competition and free entrance into markets and honest business dealings." These are emotion packed words more suitable for a jury argument than a reasoned submission to this Court. Apparently feeling that in this case "genuine errors" did not receive "hospitable treatment," it laments that "the prosecution of major Sherman Act violations will be seriously impaired."

Nowhere in these protests does the petitioner evidence sensitivity to the pernicious tendency of the laxity which it argues. Contrary to all the concepts of just procedures, it solicits judicial blessing upon unjust convictions of the innocent. The author cannot have absorbed the words of Mr. Justice Rutledge in *Kotteakos* v. *United States*, 328 U. S. 750, 773 (1946):

> "True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent. . . ."

Thirdly, the petitioner argues, in much the same vein, that the case does not involve "a violation of basic constitu-

tional rights," and is not "one in which a person's life is at stake," and that in determining whether error requires reversal "what is at stake upon its outcome" is material (Br. at 91). We respectfully submit that the commission of genuine errors adding up to denial of a fair trial deprives a defendant of a basic constitutional right. This is a federal case, and the question is whether "the procedure and standards appropriate for criminal trials in the federal courts" were applied. *Bollenbach* v. *United States*, 326 U. S. 607, 614 (1946). While "what is at stake" has some relevance in determining whether errors in a trial are harmless, much also "is at stake" when an agency of the United States government considers it "harmless" that a defendant in a criminal case has been deprived of a fair trial. The distinction between misdemeanors and felonies does not mean that only felony defendants are entitled to fair trials. See *Groppi* v. *Wisconsin*, 400 U. S. 505 (1971).

Accordingly, the judgment of the court of appeals should be affirmed, and this case should be remanded to the district court so that the defendants may be accorded a fair trial consistent with the court of appeals' opinion.

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